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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Nevada)

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THE PEOPLE,

Plaintiff and Respondent,

v.

JACOB MICHAEL SIEGFRIED,

Defendant and Appellant.

C074761

(Super. Ct. No. SF11-317)

Jurors in this criminal case accused a fellow juror of refusing to follow the law and blamed her for the jury's inability to reach a verdict. The trial court discharged the juror and replaced her with an alternate. An hour later, the jury reached a verdict, finding defendant guilty of child custody deprivation (Pen. Code, § 278.5, subd. (a)),<sup>1</sup> stalking (§ 646.9, subd. (a)), making a criminal threat (§422), disobeying a court order (§166, subd. (a)(4)), infliction of corporal injury upon the mother of his child (§273.5, subd. (a)), disobeying a domestic relations court order (§273.6, subd. (a)), and resisting arrest (§148,

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<sup>1</sup> Further undesignated statutory references are to the Penal Code.

subd. (a)(1)). The jury also found true an allegation defendant committed the infliction of corporal injury offense while out on bail for an earlier offense in another case.

(§ 12022.1.) The jury found defendant not guilty of two additional counts of making a criminal threat.

Sentenced to seven years in state prison,<sup>2</sup> defendant appeals, contending that the juror should not have been discharged because she merely disagreed with other jurors as to defendant's guilt. Because the record does not show to a demonstrable reality that the juror was unable to discharge her duty, we shall conclude that the trial court abused its discretion in discharging her, and that the error was prejudicial. Accordingly, we shall reverse the judgment.

#### FACTUAL AND PROCEDURAL BACKGROUND

Defendant and Anna Oliver were involved in a romantic relationship and have a young son together. The couple split in March 2011, and thereafter, defendant seemed to spiral out of control. If Oliver failed to answer his calls right away, he would become extremely upset and often would leave profane and threatening voice mail messages on her cell phone.

On July 15, 2011, the trial court issued an order awarding Oliver physical custody of the child and granting defendant supervised visitation at defendant's mother's home from noon on Fridays until 7:00 p.m. on Sundays. The order also provided that neither parent could take the child out of the county without the other parent's consent.

On Sunday, August 28, 2011, defendant took the child to Burning Man, a weeklong festival in the Nevada desert, without Oliver's consent. They returned on

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<sup>2</sup> Defendant was sentenced to an aggregate term of seven years, consisting of three years for inflicting corporal injury, three consecutive eight month terms for child custody deprivation, stalking, and making criminal threats, plus two years for the on bail enhancement.

Sunday, September 4, 2011, and defendant proceeded to leave a series of angry, profane, and threatening voice mail messages on Oliver's cell phone. Among other things, he threatened to take the child to Arizona or Mexico if Oliver did not come pick him up. Oliver called 911 and reported that defendant had taken the child out of the county in violation of the court order and was threatening not to return him. Defendant and the child were located at a nearby motel the following morning, and defendant was placed under arrest.

On October 17, 2011, Oliver obtained a restraining order prohibiting defendant from having any contact with her or the child.

Oliver allowed the child to spend the weekend after Thanksgiving, November 26 and 27, 2011, with defendant's family at defendant's mother's home. Oliver was supposed to pick the child up from defendant's mother when Oliver got off work Sunday evening. When Oliver contacted defendant's mother that evening, she told Oliver that the child was with defendant. When Oliver spoke to defendant, defendant demanded that Oliver meet with him and threatened to take the child to Arizona if she refused. Oliver agreed to meet with defendant but refused to get inside his truck. Defendant attempted to force her inside by dragging her by her hair. Oliver eventually broke free, took the child, and flagged down a passing motorist. Defendant left, and Oliver reported the incident to police.

On November 29, 2011, officers went to defendant's mother's home to arrest defendant. When the officers went to the front door, defendant fled out the back and ran down a hill. Officers found defendant hiding in the bushes and placed him under arrest.

## DISCUSSION

Defendant contends that "[t]he trial court erroneously excluded a juror who was not, as the court found, refusing to deliberate but merely in disagreement with others as to [defendant's] guilt on certain charges." He further asserts that the error was prejudicial

and warrants reversal of his convictions in their entirety. We agree that the trial court abused its discretion in discharging the juror, and that the error was prejudicial.

On the morning of June 27, 2013, shortly after the jury began its deliberations, the jury foreman (Juror No. 10) sent the court a note stating, “We have decided that one juror will not follow the law when she disagrees with it.” After conferring with counsel, the court reinstructed the jury in the language of CALCRIM No. 200, which, among other things, directs jurors to follow the law as it was explained, even if they disagree with it.

Later that same day, the foreman submitted a second note, advising, “Juror #7 will not consider the law in her deliberations [and] we have no hope of successfully proceeding.” The court brought the foreman into the courtroom for questioning. When asked about the two notes, the foreman stated: “We started deliberations on I think it’s Counts 3, 4 and 8 [(each of which charged defendant with making a criminal threat)]. The same instructions. We started with Count 3. We read the instructions and the juror is adamant she will not follow the law as written. She believes, and she’s sincere in this, that the law is unfair to the Defendant.” The court inquired whether Juror No. 7 disagreed over the facts or was simply unwilling to follow the law, and briefly explained the difference. The foreman responded, “We have emphasized [the elements of the offense] repeatedly. We repeated them six times maybe and she sincerely believes that she cannot follow that law in good conscience. She believes it’s unfair.” The court then allowed the attorneys to question the foreman. The prosecutor asked whether Juror No. 7 was refusing to deliberate, and the foreman responded, “Effectively she’s not deliberating. She’s insistent, adamant, I have made up my mind, that’s it.” Defense counsel asked whether there had been “any discussion of other charges,” and the foreman indicated that there had and that Juror No. 7 did not have a problem following the law as it applied to those charges.

The court then brought in Juror No. 7 for questioning. When asked whether she had a problem abiding by “the jury instruction that refers to Counts 3, 4 and 8 [and] lays

out the elements of the offense,” she responded, “I have no problems with the instructions, Judge.”<sup>3</sup> She then reminded the court that it had stated “that evidence presented was important, too,” and said, “That is what I base my decision upon.” She explained that “[w]hen [the law] talks about a criminal threat of willful bodily harm. [¶] . . . [¶] . . . I don’t feel that was established.” She continued, “[W]hat we have to work with is one side of the story. My basic feeling is that the conversations that exist between the Defendant and Anna -- [¶] . . . [¶] . . . were something that was common.” The court reviewed CALCRIM No. 1300 on criminal threats with Juror No. 7 and asked whether she had “any disagreement with accepting those elements as to what has to be proven?” Juror No. 7 responded, “I don’t think that the prosecution proved . . . .” The court interrupted, stating, “That’s not what I am asking. [¶] . . . [¶] . . . Just are you willing to accept that is what has to be proven? Those are the elements.” Juror No. 7 responded, “Yes.” The court also asked Juror No. 7 if she was “willing to discuss the facts of those elements with the other jurors,” and Juror No. 7 responded, “I try to. [¶] . . . [¶] . . . But I don’t think it’s fair to be ganged up on and being forced and telling me that I’m stubborn and I disagree . . . . And if I have to be removed from the jury because I do not understand the law as they interpret it then be it so, but this is how I feel.” The court then reread a portion of CALCRIM No. 3550 on the jury’s duty to deliberate,

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<sup>3</sup> The jury was instructed in the language of CALCRIM No. 1300 in pertinent part as follows: “The Defendant is charged in 3, 4 and 8 with having made criminal threats. To prove that the Defendant is guilty of this crime the People must prove that: One, the Defendant willfully threatened to unlawfully kill or unlawfully cause great bodily injury to Anna Oliver or a member of her immediate family; two, the Defendant made the threat orally or by electronic communication; three, that the Defendant intended that his statement be understood as a threat; four, the threat was so clear, immediate, unconditional and specific that it communicated to Anna Oliver a serious intention [and] the immediate prospect that the threat would be carried out; five, that the threat actually caused Anna Oliver to be in sustained fear for her own safety or for the safety of her immediate family; and, six, Anna Oliver’s fear was reasonable under the circumstances.”

including the duty to “[k]eep an open mind and openly exchange your thoughts,” and asked Juror No. 7 whether she thought that could occur. Juror No. 7 responded, “Didn’t occur earlier. I don’t think that I was treated fairly. The concern was trying to reach a verdict and get out of here instead of accepting what everyone had to say. At the beginning I was told that I was stubborn and outlandish in my thoughts . . . . The first thing they wanted to do was go to the judge and tell [him] that I should be removed. Then one of the jurors asked me why don’t you resign.” Finally, the court asked Juror No. 7 whether she could return to the jury room if the court reinstructed the jury on its duty to deliberate, and to do so fairly, and she said that she could.

After Juror No. 7 left the courtroom, the trial court observed that the foreman’s “statement was not that clear that [Juror No. 7] was not following the law but that they had a strong disagreement about Counts 3, 4 and 8, clearly indicating that as to other counts they didn’t have a disagreement . . . .” As for Juror No. 7, the court noted that “[h]er answers were appropriate.” The court declined the prosecutor’s suggestion to question the remaining jurors, explaining, “[W]e have to tread lightly with this.” Instead, the court reinstructed the entire panel in the language of CALCRIM No. 3550, including the “duty to talk with one another and to deliberate in the jury room,” “decide the case for yourself but only after you have discussed the evidence with the other jurors,” and “[k]eep an open mind and openly exchange your thoughts and ideas about this case.” It then directed the jury to resume its deliberations.

Later that afternoon, the foreman sent the court a third note, advising, “Juror 7 has now changed her mind on the four counts previously decided. She will no longer cooperate in productive discussions. There is no possibility of resolution.” The court responded by sending in a note of its own, which read: “Is the jury able to reach a verdict of not guilty or guilty on any of the counts?” The foreman responded, “No. The jury had reached a decision on all four counts prior to my appearance. After returning from the courtroom Juror #7 announced she had changed her mind on all four counts. There was

no discussion of the issues. This was entirely to spite the process. We cannot proceed successfully.” The trial court advised counsel that “[t]his is a unique dilemma,” and that the court was “not permitted to inquire into what they discuss and how they discuss it, even hear things like this.” The court resolved that it would “call each juror out individually and ask them . . . whether or not they can continue deliberations with any hope of reaching a verdict” and ask any follow up questions it deemed necessary.

Juror No. 1 opined that the jury was unable to continue deliberating. Juror No. 1 explained that the jury had reached a decision on four of the counts but “two-and-a-half hours ago,” one juror indicated, “I have changed my mind and my vote is such and such on all counts period. I’m not changing my mind and that is how it is. Period.”<sup>4</sup> According to Juror No. 1, the foreman was “following the protocol going over reading everything as you do and then bringing up issues,” but there was “some confusion by some as to what facts and what evidence and what feelings and what biases are.”

Juror No. 2 agreed that deliberations could not continue. Juror No. 2 explained that one of the jurors did not understand that “we have to address the law and not how she feels on things.” Juror No. 2 explained that before the jury discussed a particular count, that juror “already said a decision on how she feels about it.” “She’s interrupting everyone. She’s very upset.” When other jurors attempted to direct the juror in question to the law, she responded that “she doesn’t care what the law says. She’s stated that several times.”

Juror No. 3 also opined that “any deliberations would be futile.” Juror No. 3 stated that “it’s proving to be very difficult to come to an agreement on everything.” When the court explained that it was not necessary “that you all agree” and that it was

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<sup>4</sup> We assume for purposes of this appeal only that jurors’ generic references to a particular “problem” juror (e.g., “one juror,” “that person,” “certain person,” and “that juror”) are to Juror No. 7.

trying to determine whether the inability to agree was due to an unwillingness to follow the court's directions or "just a view of the evidence," Juror No. 3 responded, "At first it was an unwillingness to follow the directions of the Court but now I think it's sort of just turned into an unwillingness to look at things." Juror No. 3 continued, "There is a certain person who is not willing to listen or hear other people out and I think that everybody is trying to be as fair as they can in listening to that person but I also think that they are not really reciprocating that fairness. It's kind of turned into stubbornness more than anything."

Juror No. 4 said that no further deliberations could occur "[b]ecause one person is refusing to look at the evidence, [and] refusing to be open minded," and had made statements to the effect that "I don't like that law so no, I'm not going to agree with that."

After Juror No. 4 left the courtroom, the trial court observed, "My dilemma before we started was whether or not the inability to go forward or reach a verdict was fact based or following instructions based. After hearing from the consistent language from the first four I think we have an answer that it's not fact based. It sounds like it's inability to follow the Court's directions." The prosecutor agreed. Defense counsel disagreed and requested the court give Juror No. 7 an opportunity to express her position before making a decision. The court indicated, "That is where I'm headed" and continued questioning individual jurors.

Juror No. 5 opined that further deliberations could not occur, explaining that there are "interests other than what we were here to do," and as a result, the jury was having a hard time considering the evidence.

Juror No. 6 explained that "[w]e would be able to continue deliberating but there wouldn't be a unanimous vote . . . ." The court responded that a unanimous vote was not required, and Juror No. 6 stated that "there might be a problem with discussing the evidence and listening to all of the opinions" and indicated that Juror No. 7 was the cause of the problem.



Juror No. 7 also did not believe deliberations could continue. She explained that when she returned to the jury room after being questioned by the court, another juror verbally “attacked” her, calling her “ridiculous” and “outlandish.” She told the other juror that he had no right to verbally attack her, and that she had the same right as everyone else to make her “decision based on the evidence in front of [her] and [the court’s] instructions and also what was presented . . . in court.” The court agreed and asked if she understood that she could only consider evidence that was presented in court, and she responded in the affirmative. She also reminded the court of its instruction that “we should be courteous and fair” and explained, “I felt that I was being coerced into making a decision that did not follow suit with the rest of the jurors. I maintain that stance.” The court responded, “But I get the sense that there hasn’t been much discussion of the facts of the case in the deliberations.” Juror No. 7 agreed, stating, “I wanted to discuss the facts but all they were concerned about is the letter of the law. We did not really get a chance to discuss because everyone was unanimous. And when I was discussing the facts I tried to reiterate my position and they didn’t want to discuss it. . . . I said what I had to say and it was like I said something, they said something and then they were forcing me to say what -- to agree with them even though I kept arguing, well, this didn’t happen. This happened and this way. Let’s take a vote. Then I didn’t raise my hand and all of a sudden it’s like oh, God are you going to be stubborn again. . . . I don’t think that they really took the time to weigh the evidence and everything that was presented. They think my mind was made up. I think their minds were made up.” Juror No. 7 also told the court, “[I]f I am holding up justice I would rather resign because I don’t feel comfortable being put in a position of being coerced or being in the minority . . . .”

After Juror No. 7 left the courtroom, defense counsel observed that they had been presented with an “unsolvable dilemma” and urged the court to declare a mistrial. The court responded that it could also order a substitution of a juror and asked the prosecutor

for her position. She responded, “[W]e have so far statements from eight of the jurors including the foreperson that there is one person in the jury room that has . . . basically refused to deliberate.” After summarizing the comments of those jurors, the prosecutor continued, “I think the record is clear notwithstanding Juror Number 7’s comments to the Court that there has been a statement that she is not willing to listen to the facts, not willing to look at the evidence, not willing to follow the law and not willing to deliberate.” The court observed that the prosecutor’s argument had merit and called the foreman to the courtroom for further questioning.

The foreman opined that if the court ordered the jurors to continue to deliberate, they would be unable to take a vote on any of the counts. He explained that they would not get past preliminary discussions and a reading of the law due to Juror No. 7’s conduct.

After the foreman left the courtroom, the court announced that it was going to make the following findings: “[I]t appears from pretty convincing evidence that Juror Number 7 is not participating in accordance with the directions of the Court [in] the deliberations and [the court] will excuse her as a juror. . . . [¶] I understand that I am doing that over the objection of defense counsel.”<sup>5</sup>

The next court day, July 2, 2013, the court substituted the first alternate juror in place of Juror No. 7, reinstructed the jury, and the jury began their deliberations anew. Approximately one hour later, the jury advised the court that it had reached a verdict as to all counts. As previously discussed, the jury found defendant guilty as charged, except it found him not guilty of two of the three counts of making a criminal threat.<sup>6</sup>

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<sup>5</sup> The trial court did not question Juror Nos. 8, 9, 11, and 12.

<sup>6</sup> The jury apparently agreed with Juror No. 7 that the prosecution failed to establish each of the elements as to two of the three criminal threat charges.

“Great caution is required in deciding to excuse a sitting juror. A court’s intervention may upset the delicate balance of deliberations. The requirement of a unanimous criminal verdict is an important safeguard, long recognized in American jurisprudence. This safeguard rests on the premise that each individual juror must exercise his or her own judgment in evaluating the case. The fact that other jurors may disagree with a panel member’s conclusions, or find disagreement frustrating, does not necessarily establish misconduct.” (*People v. Allen and Johnson* (2011) 53 Cal.4th 60, 71.)

Section 1089 provides, in pertinent part: “If at any time, whether before or after the final submission of the case to the jury, a juror dies or becomes ill, *or upon other good cause shown to the court is found to be unable to perform his or her duty*, . . . the court may order the juror to be discharged and draw the name of an alternate, who shall then take a place in the jury box, and be subject to the same rules and regulations as though the alternate juror had been selected as one of the original jurors.” (Italics added.) Discharge is proper when a juror refuses to deliberate by expressing “a fixed conclusion at the start of deliberations and rebuff[ing] attempts to engage him or her in the discussion of other points of view raised by other jurors . . . .” (*People v. Alexander* (2010) 49 Cal.4th 846, 926.) Discharge is also warranted when a juror refuses to follow the law set forth in the court’s instructions. (*Ibid.*) However, “the circumstance that a juror does not deliberate well or relies upon faulty logic or analysis does not constitute a refusal to deliberate and is not a ground for discharge. Similarly, the circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not a ground for discharge. A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that

further discussion will not alter his or her views.” (*People v. Cleveland* (2001) 25 Cal.4th 466, 485 (*Cleveland*).)

Although a decision to discharge a juror is a matter within the trial court’s discretion, our Supreme Court has concluded that “a somewhat stronger showing” than is typical for abuse of discretion review must be made to support such decisions on appeal. (*People v. Wilson* (2008) 44 Cal.4th 758, 821.) The basis for a juror’s disqualification must appear on the record as a “demonstrable reality.” (*People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) “This standard involves ‘a more comprehensive and less deferential review’ than simply determining whether any substantial evidence in the record supports the trial court’s decision. [Citation.] It must appear ‘that the court as trier of fact did rely on evidence that, in light of the entire record, supports its conclusion that bias was established.’ [Citation.] However, in applying the demonstrable reality test, we do not reweigh the evidence. [Citation.] The inquiry is whether ‘the trial court’s conclusion is manifestly supported by evidence on which the court actually relied.’ [Citation.]” (*People v. Lomax* (2010) 49 Cal.4th 530, 589-590, fn. omitted.)

Applying these principles to the circumstances of the present case, we conclude that the trial court abused its discretion in excusing Juror No. 7 because the record before us does not establish as a “demonstrable reality” that Juror No. 7 was refusing to follow the law or deliberate. While the foreman’s first two notes advised that one juror, later identified as Juror No. 7, was refusing to follow or consider the law in her deliberations, the foreman later clarified that Juror No. 7 had no trouble following the law or discussing any of the charges except those involving criminal threats (counts 3, 4, & 8). As to the criminal threat charges, the foreman indicated that Juror No. 7 repeatedly stated that she would not follow the law because she believed it was unfair to defendant. The foreman was not asked for and did not provide any additional information about Juror No. 7’s supposed refusal to follow the law. Juror No. 7, however, was very specific when questioned by the court and counsel. After confirming that she had no problem following

the court's instruction concerning criminal threats (CALCRIM No. 1300), she explained that she did not feel that the prosecution had established an element of the offense -- that the defendant willfully threatened to cause great bodily harm to the victim. More specifically, she stated, "My basic feeling is that the conversations that exist between Defendant and Anna . . . [¶] . . . [¶] . . . were something that was common." She also said that she was willing to discuss the elements of the offense with the other jurors but explained that when she attempted to do so previously, other jurors "ganged up" on her and accused her of being "stubborn" and "outlandish." The trial court credited Juror No. 7's responses. After questioning the foreman and Juror No. 7, the court observed there appeared to be "a strong disagreement about Counts 3, 4 and 8," as opposed to a refusal to follow the law, and reinstructed the jury on their duty to follow the law even if they disagree with it.

The foreman's third note differed from the first two in that it did not claim that Juror No. 7 was refusing to follow the law. Nor did it concern the criminal threat charges (counts 3, 4, & 8). Rather, it was directed at four other unidentified counts that the jury had previously reached agreement on. According to the note, Juror No. 7 had changed her mind as to those counts and "will *no longer* cooperate in productive discussions." (Italics added.) The statement that Juror No. 7 will *no longer* cooperate in productive discussions indicates that she previously did engage in deliberations. Indeed, the foreman confirmed this fact during questioning, telling the court that Juror No. 7 had deliberated on all the counts, except counts 3, 4, and 8, and had no problem following the law applicable thereto. Having done so, any refusal by Juror No. 7 to engage in additional discussions as to those counts was not grounds for discharge. (See *Cleveland, supra*, 25 Cal.4th at p. 485 ["A juror who has participated in deliberations for a reasonable period of time may not be discharged for refusing to deliberate, simply because the juror expresses the belief that further discussion will not alter his or her views."].)

The court's questioning of individual jurors focused on whether further deliberations were likely to result in a verdict. Each of the jurors who were questioned, including Juror No. 7, opined that the jury would be unable to reach a verdict if deliberations continued, and all but Juror No. 7, blamed Juror No. 7 for the impasse. Individual questioning of these jurors revealed that it was Juror No. 7's conclusions that were the issue. Jurors stated that Juror No. 7 was "confused," based her decision on how she feels, expressed her views before reviewing the law, interrupts everyone, was "unwilling to look at things," was unwilling "to listen or hear other people out," refused to look at the evidence or be open minded, stated that she did not care about the law, had "interests other than what we were here to do," and had a "problem . . . discussing the evidence and listening to all of the opinions." None of these general statements, considered in isolation or as a whole, provide grounds for excusing Juror No. 7. As previously discussed, it is undisputed that Juror No. 7 had previously engaged in deliberations concerning all counts except those involving making a criminal threat. That she was no longer willing to engage in discussions concerning those other counts did not amount to a refusal to deliberate. (*Cleveland, supra*, 25 Cal.4th at p. 485.) As for counts 3, 4, and 8 (criminal threats), Juror No. 7 told the court that she had no problem following its instruction concerning criminal threats and explained in detail the basis for her belief that the prosecution failed to prove an element of the offense. The trial court did not find Juror No. 7's statements not credible; to the contrary, after questioning the foreman and Juror No. 7, it observed that the issue was not that Juror No. 7 was not following the law but that "they had a strong disagreement about Counts 3, 4 and 8." As former Chief Justice George, writing for a unanimous court, explained in *Cleveland*: "[T]he circumstance that a juror disagrees with the majority of the jury as to what the evidence shows, or how the law should be applied to the facts, or the manner in which deliberations should be conducted does not constitute a refusal to deliberate and is not a ground for discharge." (*Cleveland, supra*, 25 Cal.4th at p. 485.)

The present case is strikingly similar to *Cleveland*. There, on the second day of deliberations, the jury sent a note requesting the replacement of one juror because he “ ‘does not agree with the charge and does not show a willingness to apply the law. [He] will not abide the facts and apply the law.’ ” (*Cleveland, supra*, 25 Cal.4th at p. 470.) When questioned, the foreperson explained that the juror in question did not believe that there was a valid charge, and had informed the other jurors that they were “ ‘not going to sway [his] mind,’ ” and that he did “ ‘not want to discuss the five points of the law as to [one of the counts] . . . .’ ” (*Id.* at pp. 470-471.) The foreperson also asserted that the juror only “ ‘[h]alfheartedly’ ” listened to the other jurors before “ ‘interrupt[ing].’ ” (*Id.* at p. 471.) The court brought the entire jury panel into open court, and 10 jurors raised their hands when asked if they thought there were any jurors who were not deliberating or considering the opinions of others. (*Id.* at p. 471.) When questioned individually, the other jurors asserted that the juror in question was disregarding the facts and the law and refusing to answer questions from the others. (*Id.* at pp. 471-473.) Among other things, the jurors stated that the juror in question was not concerned about the elements of the offense, did not “ ‘want to go by the rules of the court and the laws,’ ” “ ‘appeared to be ‘disregarding the evidence,’ ” “ ‘did not participate when the jury discussed the five elements of the crime,’ ” based his decision on his feelings, and had “ ‘his own agenda.’ ” (*Id.* at pp. 472-473.) The juror in question, however, explained that he had listened to other jurors and accepted the court’s instructions but had a different view of the facts of the case. (*Id.* at p. 473.) Despite his explanation, the trial court excused the juror, finding that he was “ ‘not functionally deliberating with the other jurors’ ” because he had refused to respond to their questions, and that “ ‘[i]t doesn’t do any good to talk in generalities as he does want to.’ ” (*Ibid.*)

In holding that the record did “not establish ‘as a demonstrable reality’ that [the juror] refused to deliberate,” our Supreme Court found that “[a]lthough 10 jurors raised their hands when the court asked whether one or more jurors were not deliberating,

individual questioning of the jurors revealed that it was the conclusion arrived at by [that juror] that was at issue.” (*Cleveland, supra*, 25 Cal.4th at pp. 485-486.) The same is true here.

As detailed above, the record indicates that Juror No. 7 engaged in deliberations and reached a conclusion contrary to other jurors on several of the counts. While jurors claimed that she was refusing to follow the law as to counts 3, 4, and 8, which charged defendant with making a criminal threat, the foreman’s third note and the individual questioning of jurors revealed that their real concern was that they would not be able to reach a verdict on some or all of the charges due to the conclusions reached by Juror No. 7. As was the case in *Cleveland*, “It is possible that Juror No. [7] employed faulty logic and reached an ‘incorrect’ result, but it cannot properly be said that [s]he refused to deliberate.” (*Cleveland*, 25 Cal.4th at p. 486.) She participated in deliberations and attempted to explain the basis for her conclusions. That she did not do so well or skillfully and refused to address the issues in the manner preferred by the foreman and other jurors is not a basis for removal. (*Ibid.*; *People v. Engelman* (2002) 28 Cal.4th 436, 446.) The trial court abused its discretion in discharging her and replacing her with an alternate.

The question remains whether this error is prejudicial and requires reversal. The evidence indicates that Juror No. 7 was a holdout juror for acquittal on many, if not all counts on which defendant was ultimately convicted. After approximately one hour of deliberations, the new jury returned verdicts of guilty on all but two counts. Accordingly, the requisite harm for a reversal is shown.<sup>7</sup> (See *Cleveland, supra*, 25 Cal. 4th at p. 486; *People v. Bowers* (2001) 87 Cal.App.4th 722, 735-736.)

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<sup>7</sup> Because we are reversing on the ground the trial court erred in discharging a juror, we need not consider defendant’s additional claims on appeal.



DISPOSITION

The judgment is reversed.

/s/  
Blease, Acting P. J.

I concur:

/s/  
Nicholson, J.

Mauro, J., Dissenting.

“ ‘A refusal to deliberate consists of a juror’s unwillingness to engage in the deliberative process; that is, he or she will not participate in discussions with fellow jurors by listening to their views and by expressing his or her own views. Examples of refusal to deliberate include, but are not limited to, expressing a fixed conclusion at the beginning of deliberations and refusing to consider other points of view, refusing to speak to other jurors, and attempting to separate oneself physically from the remainder of the jury.’ (*People v. Cleveland* [(2001)] 25 Cal.4th [466,] 485.) A refusal to deliberate is misconduct.” (*People v. Lomax* (2010) 49 Cal.4th 530, 589 (*Lomax*).)

Although the decision to discharge a juror is within the trial court’s discretion, appellate courts require a “ ‘somewhat stronger showing’ ” than simply determining whether substantial evidence supports the decision. (*Lomax, supra*, 49 Cal.4th at p. 589, quoting *People v. Wilson* (2008) 44 Cal.4th 758, 821.) The basis for a juror’s disqualification must appear on the record as a “ ‘demonstrable reality.’ ” (*Lomax, supra*, 49 Cal.4th at p. 589, quoting *People v. Barnwell* (2007) 41 Cal.4th 1038, 1052.) However, in applying the demonstrable reality test, we do not reweigh the evidence. (*Barnwell, supra*, 41 Cal.4th at p. 1053.) “The inquiry is whether ‘the trial court’s conclusion is manifestly supported by evidence on which the court actually relied.’ ” (*Lomax, supra*, 49 Cal.4th at p. 590, fn. omitted, quoting *Barnwell, supra*, 41 Cal.4th at p. 1053.)

Here there is evidence in the record from many of the jurors that Juror No. 7 would not follow the law and was not deliberating. There is also evidence from Juror No. 7 that she was following the law and attempting to deliberate. Unlike this court, the trial court was in a position to evaluate the credibility of the jurors. It considered the evidence, which we must not reweigh, and found that Juror No. 7 was not participating in deliberations. On this record, there is solid evidence (upon which the trial court actually

relied) supporting the trial court's decision to discharge the juror. Accordingly, I dissent, and I would address defendant's other contentions on appeal.

/s/  
Mauro, J.